United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,089 Criminal No. 653-69

UNITED STATES OF AMERICA

v.

CHARLES D. CANNON, JR.,

Appellant

APPELLANT'S BRIEF

James R. Treese, Esq.
Court Appointed Counsel
for Appellant Charles
Cannon

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STATEMENT OF THE CASE

On January 2, 1969 the defendants below, Charles D. Cannon, Jr. and John W. Patterson were arrested in the District of Columbia for violations of 26 USC 4704 (a), 21 USC 174 (Possession of narcotic drugs not in original stamped package; receipt and concealment of narcotic drugs, knowing same to have been imported contrary to law), 33 D.C. Code 702 (a)(4) (possession of dangerous drugs not obtained on valid prescription), and as to Charles Cannon only 22 D.C. Code 3204 (carrying a dangerous weapon).

On May 5, 1969 the Grand Jury formally indicted the defendants in a six count indictment with violating the above statutes and on May 16, 1969 the defendants entered pleas of not guilty. A Motion to Dismiss the Indictment was filed by the Defendant Cannon on May 29, 1969 based on United States Supreme Court decisions in Leary v. United States and United States v. Covington both decided ~~on May~~ 19, 1969. The ~~Motion~~ to Dismiss was de~~nied~~ by the Court on June 20, 1969.

Another Motion to Dismiss the Indictment was filed by the defendant Cannon on September 17, 1969 (also the scheduled first day of trial) based on grounds that he had been deprived of a speedy trial as secured by the Sixth Amendment of the Constitution of the United States and further that during the period awaiting trial a material witness, one Gloria Irvin, for the defendant Cannon

had died on June 19, 1969. This Motion was denied and the jury trial of the two defendants began.

For its case the Government presented as witnesses the arresting Police officers, Ronald R. Watson and Robert H. Budd, Richard A. Bias, who was a police officer attached to the Narcotic Section of the Metropolitan Police Department and Mr. John Allan Steele, a forensic analytical chemist employed by the United States Internal Revenue Service.

The arresting officers testified that while cruising on duty in the vicinity of South Capitol Street and Portland Street at approximately 3:00 A.M. on January 2, 1969 their attention was drawn to a speeding motor vehicle (TR 86-88)[1] After following the speeding car and displaying and sounding their warning devices, the car was stopped in the vicinity of South Capitol Street and Virginia Avenue in the District of Columbia (TR 88-89). While following the car, Police officer Watson (driver of the police car) testified that he observed two persons in the car ahead of him which upon stopping and investigating turned out to be the defendants (TR 90-93).

The defendant Cannon (the driver of the followed car) was arrested for speeding and failure to exhibit a permit (TR 95). Following his arrest and search, a yellow envelope containing 46

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1 Throughout appellant's Brief the abbreviation TR followed by numbers refers to the transcript of the proceedings and page numbers.

capsules of white powder (Gov't Ex 4) was removed from Cannon's right coat pocket (TR 96-97). A search of auto uncovered the following items at their respective locations in the vehicle:

a) A loaded .25 automatic gun (Government Exhibits 9A & 9B). Between the driver's seat and passenger's seat (TR 97-98)

b) A brown Peoples Drug Store paper bag containing a plastic bag with white powder and two bottles containing yellow tablets (Government Exhibits Nos. 6, 7, 8A and 8B) found beneath the right front passenger seat where the defendant Patterson had been sitting (TR 99-101).

c) A brown manila envelope containing 186 capsules of white powder (Government Exhibit No. 2) and a brown manila envelope containing 21 yellow tablets (Government Exhibit No. 3) from the glove compartment (TR 102-103).

All of the above items excepting the gun were turned over to Officer Bias of the Narcotic Section (TR 103) where field tests were performed by Officer Bias (TR 212) and then the items were turned over to Mr. John Steele, a chemist for analysis (TR 214). As a result of these tests the following conclusions were reached:

a) The 186 capsules (Government Exhibit No. 2) contained heroin hydrochloride and morphine hydrochloride (TR 68-70).

b) The 21 tablets (Government Exhibit No. 3) contained desoxyn (TR 70).

c) The 46 capsules (Government Exhibit No. 4) contained heroin hydrochloride and morphine hydrochloride (TR 72).

d) The plastic envelope containing white powder (Government Exhibit No. 7) contained heroin hydrochloride and morphine hydrochloride (TR 77-78).

e) The two bottles of tablets (Government Exhibit Nos. 8A and 8B) contained desoxyn (TR 78).

Mr. Steele testified that heroin hydrochloride and morphine hydrochloride are narcotic drugs (TR 70) and desoxyn is a dangerous drug for which a prescription is required (TR 71-72). No tax stamps or prescription forms were found in connection with the heroin or desoxyn (TR 79).

On cross examination, Mr. Steele testified that heroin is legally manufactured by chemical companies in the United States (TR 81) from legally imported opium or morphine (TR 84).

Before the Government rested its case, the Court conducted a hearing out of the presence of the jury to dispose of the question of whether to permit certain prior convictions to be propounded to the defendants if they should decide to take the stand (TR 174-210). Specifically, the Government requested that they be permitted to use a 1963 Housebreaking and larceny conviction and a 1966 petit larceny conviction for impeachment purposes on Cross-examination, should Charles Cannon decide to take the stand (TR 174). Defense counsel opposed this request on grounds that the above offenses were so removed in time and character to the charges before

the Court together with the reason that Charles Cannon was required to take the stand in his own defense (because of the dead witness, Gloria Irvin), the prejudical effects of impeachment would far outweigh the probative relevance of the prior convictions (TR 175-176).

Charles Cannon testified at this hearing that he had been with Gloria Irvin during the evening hours of January 1 and 2, 1969 (TR 179-183) and that he had observed the Peoples Drug Store paper bag which ultimately was shown to contain narcotic drugs and dangerous drugs (TR 182). He testified that he did not know what was in the bag (TR 183). The defendant also stated at the hearing that Gloria Irvin had placed her belongings in his coat pocket (TR 183).

The Court decided to permit the use of Cannon's prior convictions by the Government in its cross-examination. (TR 207)

At the conclusion of the Government's case, defense counsel moved for acquittal as to all counts in the indictment and the Court denied the motion (TR 226-229).

The defense of Charles Cannon was based on a claim that the narcotic and dangerous drugs were placed on the person of Charles Cannon (TR 237, 256, 257, 263) and in the automobile (TR 235-236) by a Gloria Irvin, who was deceased at time of trial (TR 3, 236). Charles Cannon testified that he had no knowledge concerning the drugs found on his person (TR 242) or in the car (TR 235-236, 267). It was shown that Gloria Irvin was dead at time of the trial (TR 236).

Cannon stated that he had seen the gun and that it did not belong to him but to a girl named Dolores Calloway (TR 239) who also was identified as the owner of the car driven by Mr. Cannon on that evening (TR 234-235).

On cross-examination and over objection the prosecutor asked Charles Cannon if he had been convicted in the District of Columbia in 1963 for housebreaking and larceny and in 1966 for larceny and the defendant acknowledged that he had (TR 267).

The other witness for the defense was Miss Delores Venice Calloway who testified that she owned the car driven by Charles Cannon (TR 269) and that she owned and placed the gun between the two front seats of her car during the night in question (TR 274).

Defense counsel renewed his motion to dismiss made at the close of Government's case which was denied (TR 307).

Following closing arguments and the charge to the jury (TR 308-345), the jury adjourned for deliberation and on that same day (September 24, 1969) the jury returned a verdict of guilty as charged as to Charles Cannon who was then remanded to jail pending sentencing (TR 345-346).

On September 25, 1969, Cannon filed a Motion for Judgment of Acquittal or in the Alternative for a New Trial which was denied by the Trial Judge on October 1, 1969.

On October 10, 1969 the Government filed an Information as to Cannon's previous record and on January 5, 1970 defense counsel filed a Motion for Release on Personal Recognizance Pending Sentencing.

On February 26, 1970 Charles Cannon was sentenced as follows:

> TWO (2) YEARS TO TEN (10) YEARS ON COUNTS ONE AND FOUR,
>
> TEN (10) YEARS ON COUNTS TWO AND FIVE,
>
> ONE (1) YEAR ON COUNT THREE,
>
> TWO (2) YEARS TO SIX (6) YEARS ON COUNT SIX; SAID SENTENCES TO RUN CONCURRENTLY.

On March 4, 1970, Charles Cannon noted a timely Appeal in this Court from the judgment of the United States District Court for the District of Columbia.

ARGUMENT
MEMORANDUM AT LAW

A

WHERE A CLEAR ~~SHOWING~~ OF PREJUDICE TO THE ~~DEFENSE~~ OF THE ACCUSED IS CREATED BY THE DEATH OF A MATERIAL WITNESS MORE THAN SIX MONTHS AFTER THE ARREST, DOES PROSECUTION SUBSEQUENT TO THE DEATH OF THE WITNESS DEPRIVE THE ACCUSED TO HIS RIGHT OF A SPEEDY TRIAL SECURED BY THE SIXTH AMENDMENT OF THE CONSTITUTION?

In the instant case, the accused was arrested on January 2, 1969 and was indicted May 5, 1969.[2] A plea of not guilty was entered by the defendant on May 16, 1969. A material witness named Gloria Irvin a/k/a Gloria Ervin a/k/a Gloria Valentine a/k/a Gloria Thompson a/k/a Gloria Tugman, was the victim of a homicide on or about June 19, 1969 at 1815 18th Street, N. W. in the District of Columbia. (TR 3, 236). A Motion to Dismiss the Indictment was filed by the defendant Cannon on September 17, 1969 on grounds that he had been deprived of his right to a quick and speedy trial as guaranteed by the Sixth Amendment of the Constitution of the United States. This Motion was denied by the United

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2 A delay of this length has caused this Court concern before. Williams v. United States, 129 U.S. App D.C. 332, 394 F2d 957 (1968); Hood v. United States, 125 U.S. App. D.C. 16, 365 F2d 949 (1966)

States District Court, and on that same day, the trial commenced in the Court below.

> "The very assumption of the Sixth Amendment is that unreasonable delays are by their very nature prejudicial. It is not generally necessary for the defendant to demonstrate affirmatively how he has been prejudiced by an unreasonable delay."

Hedgepeth v. United States, 124 US App D. C. 291, 294, at n3, 364 F2d at 687 n3 (1966).

As this Court has recently recited in the case of Smith v. United States, ____ U.S. App D.C. _____, 418 F2d 1120 (1969) at page 1122 a dismissal is required where

> "... the defendant makes out a prima facie case of prejudice to his defense -- not necessarily showing conclusively that the defense was prejudicial, but at least making a showing of a reasonable likelihood of such prejudice, a showing not negatived by rebuttal of the prosecution."

The above holdings are particularly apposite in this case because the defendant below was able to demonstrate the prejudice to his defense during the delay awaiting trial.

The principal defense of the defendant Cannon in the trial below was that the illegal narcotic drugs and dangerous drugs in question were placed in the vicinity and on the person of the defendant by Gloria Irvin. (TR 235-237, 256, 257, 263).

As such, the only persons who could testify as to such an act were the defendant himself and Gloria Irvin. These facts are also relevant to the argument concerning the claimed error by the District Court by permitting into evidence the prior criminal record of the defendant.[3]

Although the trial of the accused commenced nine months following his arrest (a length of time generally recognized as less than the average period between arrest and trial in this jurisdiction at that time), the accused Charles Cannon was incarcerated during the entire period of time between arrest and trial. Accordingly, Cannon was unable to assist personally in his own defense by locating witnesses such as the deceased, Gloria Irvin. A Motion for his release pending trial was made and denied at the defendant's preliminary hearing. The Constitutional guarantee of a speedy trial "is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120, 86 Sup. Ct. 773 (1966).

Information concerning the death of Gloria Irvin was not received by counsel for the defendant until several days before trial (TR 3, 4). In its opposition to Cannon's Motion to Dismiss

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3 See Argument Brief page 14 et seq

the Government made much of the fact that no subpoena for the decedent, Gloria Irvin, had been filed with the Court preceding trial, but as explained by defense counsel to the Court (TR 7, 8) it was a decision based on a belief that the witness Gloria Irvin would be a hostile witness and the service of subpoena upon her well in advance of trial date would only alert her to the fact that she would be called to trial.

Of course, to speculate on the potential testimony of Gloria Irvin or, in fact, to assume that Gloria Irvin would have testified at all, avoids the Constitutional issue. There can be no denying the fact that Gloria Irvin was a potential material witness and in her absence, the defendant was required to take the stand and testify concerning the placement of narcotics by the decedent. This testimony went uncorroborated by the witness's absence and as explained elsewhere in this Brief, caused the defendant's prior criminal record to be brought before the jury.

Based on the foregoing, it is urged upon this Court that the appellant's Constitutional right to a speedy trial was denied and that the delay resulted in prejudice to his defense.

B

WHERE THE DEFENDANT IS REQUIRED TO TAKE THE STAND IN ORDER TO ESTABLISH HIS DEFENSE, DOES THE PREJUDICAL EFFECT OF IMPEACHMENT OUTWEIGH THE PROBATIVE RELEVANCE OF PRIOR CONVICTIONS TO THE ISSUE OF CREDIBILITY THEREBY REQUIRING THE COURT TO EXCLUDE PRIOR CONVICTIONS?

In the instant case, the Court conducted a hearing out of the presence of the jury to determine the admissibility of appellant's prior convictions for housebreaking and larceny in 1963 and petty larceny in 1966 (TR 174-210). Specifically, the Government requested the use of these prior convictions for impeachment purposes if Charles Cannon should decide to take the stand and testify in his own defense. Defense counsel argued that the prior convictions were so removed in character and time from the accused crimes involving narcotics that the Court's discretion should be exercised in favor of excluding the prior convictions. The problem was made even more acute than normal in Charles Cannon's case because in order to establish his defense, i.e. that the narcotic drugs and dangerous drugs found on his person and in his presence were placed there by Gloria Irvin, deceased, he was forced to take the stand.

The Court in the instant case conducted a so called "Luck hearing". Luck v. United States, 121 U.S. App D.C. 151, 348 F2d 763 (1965). The guidelines set forth in Gordon v. United States, 127 U.S. App D.C. 343 (1967) 383 F2d 936 were expressly

followed by the Court in reaching a decision (TR 176-177, 206-208). These guidelines as quoted by the Court in the instant case are as follows:

> "I am going to read the several things that Justice Burger suggested the Court take into consideration in connection with this Luck problem.
>
> "First, whether the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. Or even if relevant, whether because of truth would be helped more by letting the jury hear the defendant's story then by the defendant foregoing that opportunity because of fear of prejudice founded upon prior conviction.
>
> "Once the trial judge's discretion is invoked the accused should have opportunity to show why judicial discretion should be exercised in favor of exclusion. The burden of persuasion is on the accused.
>
> "Second, crimes which reflect on honesty and integrity such as acts of deceit, fraud, cheating, and stealing vs acts of violence such as those resulting from temper, combative nature, extreme provocation, etc., the latter type crimes generally have little or no bearing on honesty and veracity.
>
> "Three, nearness or remoteness of the prior conviction.
>
> "Four, whether the prior conviction is for the same type of crime as that which the accused is on trial for. If it is the probable degree of prejudice will be high.

> "Suggestion: where there are multiple prior convictions for the same type of crime, limit impeachment to a single prior conviction and then only when the circumstances indicate strong reasons why disclosure and where the conviction directly relates to veracity.
>
> "Five, whether the defendant is remaining silent out of fear of being prejudiced by his prior convictions. Even though prior conviction might be relevant and the risk of prejudice does not warrant their conclusion the trial judge might conclude it is more important the jury have the benefit of the defendant's version of the case than have the defendant remain silent out of fear of impeachment.
>
> "In many cases the best way -- and I have already read this -- is to have testimony out of presence of the jury."

At the hearing in the instant case, the defendant Cannon took the stand and satisfied the aforesaid considerations recited in Gordon v. United States, supra, to the extent that exclusion of prior convictions was necessary.

If judicial discretion should be expressed in favor of exclusion, the burden of persuasion was on the defendant Cannon. In his testimony it was shown that Charles Cannon had been in the presence of Gloria Irvin for the better part of the evening hours of January 1 and January 2, 1969. While in her presence, Charles Cannon observed the PeoplesDrug Store paper bag (which subsequently was shown to have contained narcotic drugs and dangerous drugs

as defined by law) and Charles Cannon further testified that he did not know what was in the bag (TR 235-236, 242, 267). The defendant also related that he had not been told what was in the bag (TR 182-183). Furthermore, while visiting a night club known as the Shelter Room, Gloria Irvin filled up Charles Cannon's pockets with her personal belongings (TR 237, 256-257, 263). Charles Cannon further testified that Gloria Irvin died after his arrest and before trial (TR 186).

Accordingly, Charles Cannon satisfied his burden of persuasion requiring exclusion. To remain silent out of fear of being prejudiced by his prior convictions would have deprived the jury of the benefit of Charles Cannon's version of the case. Where an instruction relative to inferences arising from unexplained possession of illegal drugs is permissable, the importance of the defendant's testimony becomes more acute.[4] As the Court said in Gordon v. United States, supra, at 127 U.S. App D.C. 343, 347-348, 383 F2d 936, 940-941

> "One important consideration is what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions. Even though a judge might find the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not

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[4] Gordon v. United States, 127 U.S. App D. C. 343, 348, 383 F2d 936, 941, n11

> "warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment."

No other witness existed to prove that Gloria Irvin placed the narcotic drugs and dangerous drugs on and near Charles Cannon without his knowledge as to their existence except Charles Cannon himself. In short, Charles Cannon was forced to take the stand in his own defense and under such circumstances, the Court should have excluded his prior convictions. Instead, and it is respectfully submitted, the Court erred in exercising it's discretion and admitted these prior convictions in evidence before the jury (TR 267).

C

DID THE COURT ERR IN INSTRUCTING THE JURY ON THE STATUTORY PRESUMPTION OF GUILT AS TO ILLEGAL IMPORTATION OF NARCOTIC DRUGS AND KNOWLEDGE OF ILLEGAL IMPORTATION OF NARCOTIC DRUGS BASED ON MERE POSSESSION OF NARCOTIC DRUGS WHERE UNREFUTED EVIDENCE OF LEGAL IMPORTATION OF NARCOTIC DRUGS AND LEGITIMATE DOMESTIC MANUFACTURE OF NARCOTIC DRUGS WAS INTRODUCED?

The Government's expert witness, who was a forensic analytical chemist with the Federal Internal Revenue Service, namely, Mr. John Allan Steele, testified on cross-examination that his laboratory obtains heroin manufactured by certain drug companies from opium and morphine which, in turn, is legally imported into this country pursuant to international treaties. (TR 81, 84, 85). The statutes, 21 USC § 174 and 26 USC § 4704 (a), as relevant in this case provide:

> "Whoever fraudulently or knowingly imports or brings any narcotic drugs into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned ...

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The United States Supreme Court, in the case of James Turner v. United States, 38 U.S.L. Week 4103 (U.S. Jan. 20, 1970) upheld the validity of the statutory presumption, i.e. that possession of heroin is equivalent to possessing imported heroin. However, unlike the factsin Turner, supra, there was evidence introduced in the trial of Charles Cannon showing legitimate domestic production of heroin. The importance of this uncontradicted evidence is highlighted by the Supreme Court's language in Turner reported at 38 U.S.L. Week 4106 as follows:

> "Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light. Instead, the inference authorized by the section, although frequently challenged, has been held in this Court and in countless cases in the district courts and courts of appeals, these cases implicitly reflecting the prevailing judicial view that heroin is not made in this country but rather is imported from abroad. If this view is erroneous and heroin is or has been produced in this country in commercial quantities, it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record."

It was precisely through the trial of Charles Cannon's case that the proof of domestic production of heroin was placed on the record.

The Court in Turner, supra, noted at 38 U.S.L. Week 4108

> "... there are recurring thefts of opium, morphine, and codeine from legal channels which could be used for the domestic, clandestine production of heroin."

The possibility of such a theft occurring together with proof of domestic manufacture of heroin should require that an inference of illegally imported heroin and knowledge of same from a finding of mere possession is too speculative to support the criminal conviction of the accused. A criminal statutory presumption is irrational and arbitrary and therefore unconstitutional unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. Leary v. United States, 395 US 6, 23 L Ed 2d 57, 89 Sup. Ct. 1532 (1969).

At the trial when evidence was introduced regarding the legitimate domestic manufacture of heroin, the burden of coming forward with rebutable evidence shifted to the Government and they cannot be heard now to prove with statistics or other factual data that there is no substantial proof of domestic legitimate manufacture of heroin in commercial quantities. The damage has been done. The Court instructed the jury at the trial

below (TR 309-323) on the statutory presumption thereby depriving the appellant of his right to a jury trial on the question of illegal importation and knowledge of narcotic drugs.

It is urged that consideration of the above argument requires reversal and dismissal as to the appellant Charles Cannon.

CONCLUSION

Based on the foregoing Statement of the Case, Authorities, and Argument, appellant respectfully urges this Court to reverse the verdict against Charles Cannon in the United States District Court for the District of Columbia and dismiss the case against Charles Cannon as prosecuted by the United States of America.

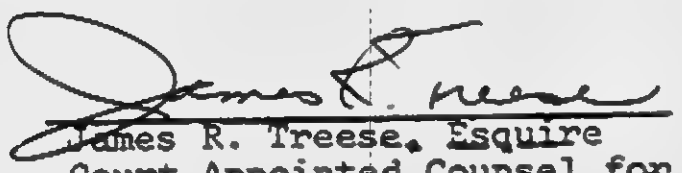

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TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied upon are marked by asterisks.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1. Did the delay between arrest and trial, during which time a defense witness and her alleged testimony died, abridge appellant's Sixth Amendment right to a speedy trial?

2. Did the trial court abuse its discretion in permitting the prosecutor to question appellant about two previous convictions?

3. Did the evidence sufficiently show that appellant knowingly possessed smuggled heroin which had no tax stamps affixed thereto?

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* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,089

UNITED STATES OF AMERICA, APPELLEE

v.

CHARLES D. CANNON, JR., APPELLANT

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

On May 5, 1969, a six-count indictment was returned against appellant and one John W. Patterson.[1] On September 17, 1969, the Honorable John J. Sirica heard appellant's motion to suppress evidence and denied it. Trial began the following day and continued until September 24, when the jury found appellant guilty as charged.[2]

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[1] Appellant and Patterson were both charged with violations of 26 U.S.C. § 4704 (a), 21 U.S.C. § 174 and 33 D.C. Code § 702(a)(4). Appellant was also charged alone with separate violations of 26 U.S.C. § 4704(a) and 21 U.S.C. § 174 and with carrying a pistol without a license in violation of 22 D.C. Code § 3204.

[2] Mr. Patterson was acquitted.

Appellant was sentenced on counts one and four to two to ten years on each count, on counts two and five to ten years on each count, on count three to one year and on count six to two to six years. All sentences were to be served concurrently. This appeal followed.

The Pre-trial Hearing

At the hearing on appellant's motion to suppress the evidence on September 17, 1969, appellant's motion to dismiss the indictment for lack of a speedy trial was also heard and denied. Appellant based his motion to dismiss on the fact that a crucial witness to his case, Gloria Ervin, had been murdered on June 19, 1969, some six months after the offense. He argued that if there had been a speedy trial there would not have been the prejudicial frustration of appellant's chances to call Miss Ervin as a witness (Tr. 3). Appellant hypothesized that Miss Ervin would have testified that she put the drugs into his coat pocket and into the car[3] (Tr. 3-4). The prosecutor advised the court that the arrest had occurred on January 2 and that the case was not presented to the grand jury until April because of the necessary wait for the chemical analysis of the seized narcotics. The indictment was returned on May 5, and in June the Government certified that the case was ready for trial. Trial was set for September 11, yet on that date there was no outstanding subpoena for Miss Ervin, who trial counsel did not know was deceased at the time[4] (Tr. 5-7). The prosecutor added that any prejudice that the defendants might have suffered as a result of Miss Ervin's death was not caused by any undue or unnecessary delay at the hands of the Government (Tr. 7). The

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[3] Of course, Miss Ervin could have invoked her constitutional right not to testify if she had not met her premature death.

[4] Trial counsel for appellant represented that Miss Ervin would have been a hostile witness and that he therefore did not wish to alert her prematurely of his intention to call her as a witness (Tr. 8).

court denied the motions to dismiss the indictment and next heard the motion to suppress the evidence seized (Tr. 8-9).

Appellant testified that he drove Miss Delores Calloway's Mustang convertible from the Shelter Room with his co-defendant, John W. Patterson, as his sole passenger at approximately 3:00 a.m. on January 2, 1969 (Tr. 10-11). Appellant assessed his speed as 24 to 27 miles per hour when he was stopped by the police (Tr. 12). The police searched the car and then searched appellant. A People's Drug Store bag with narcotics in it was found beneath the seat. A pistol was found deep in the interior of the front seat. Appellant denied that he was going 70 miles per hour when the police tracked him (Tr. 14-17).

The owner of the Mustang, Delores Venice Calloway, admitted that the pistol was hers, but she had no knowledge of the heroin in her car[5] (Tr. 27).

Metropolitan Police Officer Ronald R. Watson of the Eleventh Precinct was patrolling in his scout car with Officer Robert Henry Budd when he observed a Mustang convertible speeding past. Officer Watson followed as the speeding car reached 80 miles per hour. Watson turned on his red light and siren and directed his spotlight into the convertible's rear window. The warning devices did not gain the attention of the speeding driver of the Mustang until the car reached South Capitol and M Streets, about one mile from the point where the chase began (Tr. 30-33). Officer Watson saw the driver of the speeding vehicle, appellant, apparently pushing something under the front seat (Tr. 36). Appellant was unable to demonstrate a driver's permit or registration for the Mustang and was placed under arrest. A search of appellant revealed a yellow envelope containing a white powder. Of-

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[5] Miss Calloway was advised by the court that anything she said might be used against her and that she had a right not to testify (Tr. 19). Miss Calloway was subsequently convicted in the Court of General Sessions on January 8, 1970, for carrying a pistol without a license in Criminal Case No. 37549-69.

ficer Watson then looked in the car where appellant had apparently been pushing something, and there in plain view were a .25 caliber automatic pistol and a ten-inch butcher knife.[6] Appellant was then placed under arrest for carrying a pistol without a license. A search of the car revealed the People's Drug Store bag and the glove compartment filled with narcotics (Tr. 33-37).

The court found that the story given by Officer Watson was more reasonable than that of appellant and his witness and denied the motion[7] (Tr. 57-58).

The Trial

A. *The Government's Case*

Officer Watson arrested appellant after pursuing him at 80 miles per hour, overtaking him, and finding appellant without a permit and registration (Tr. 88, 92, 95). A search of appellant revealed forty-six capsules of heroin in his right coat pocket (Tr. 96). A look at the console next to where appellant sat further revealed a .25 caliber automatic pistol and a ten-inch butcher knife (Tr. 97). A search next to the seat where the co-defendant Patterson sat uncovered a bag which contained 200 capsules of Desoxyn.[8] A search of the glove compartment disclosed 186 capsules of heroin and twenty-one more capsules of Desoxyn (Tr. 99-103). A search of Patterson revealed sixty-nine $1 bills, three $5 bills, one $10 bill, several rolls of quarters and a pocketful of change (Tr. 132-138).[9]

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[6] The two weapons were on the driver's side of the hump which separated the bucket seats in the Mustang (Tr. 36).

[7] The denial of the motion to suppress evidence is not challenged on this appeal.

[8] Desoxyn is the trade name for methamphetamine hydrochloride, a drug which is controlled by the Dangerous Drug Act, 33 D.C. Code § 702 (a) (4) (Tr. 70-72).

[9] During the high-speed chase Watson saw Patterson attempting to conceal something under his seat in the same manner as appellant had done (Tr. 132).

Officer Budd corroborated the fact that Officer Watson had to attain the speed of 75 miles per hour in order to keep up with the Mustang driven by appellant (Tr. 145). Officer Watson testified that none of the drugs had tax stamps or a prescription affixed thereto (Tr. 105).

Narcotics Squad Officer Richard A. Bias received the narcotics from Officer Watson at the Eleventh Precinct (Tr. 212). There were no tax stamps or prescriptions affixed to any of the drugs (Tr. 213). The drugs were put into a lock-sealed envelope and personally delivered to John A. Steele, a United States chemist with the Treasury Department (Tr. 214).

Chemist Steele informed the court and jury of his analytical findings of heroin and methamphetamine hydrochloride in the examined capsules (Tr. 65-70). Mr. Steele stated at one point in his testimony that in his laboratory there was a quantity of heroin which was used "as a standard for testing." He did not know where it came from ("It was there when I got there") except that it was "manufactured by a chemical company, with a tax stamp on the bottle" (Tr. 81).

At this point both counsel approached the bench. Referring to his earlier motion to dismiss the indictment based on *Leary* v. *United States*, 395 U.S. 6 (1969), defense counsel argued that since there is legitimate heroin in the country "there cannot be a reasonable presumption of illegal or knowledge of illegal importation based on the fact there is legal importation" [10] (Tr. 82).

B. *The* Luck *Hearing*

The trial judge, after listening to the prosecutor's proffer to use a 1963 housebreaking and 1963 and 1966

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[10] The court did not grant the *Leary* motion but permitted additional defense questions directed at how heroin comes to the United States. Mr. Steele testified that heroin is derived from opium and that the Treasury Department obtains an opium permit through international treaties with countries that have treaties to produce opium. Mr. Steele went on to state that no opium or heroin is produced in the United States but that all opium is imported from treaty countries (Tr. 84-85).

petit larcenies against appellant, decided to hold a *Luck* hearing out of the presence of the jury (Tr. 174-176). Appellant testified to basically the same facts which he had earlier stated at the hearing on the motion to suppress. His testimony at this hearing differed from his prior testimony in that he said he first saw the co-defendant Patterson at Jazzland, whereas previously he had testified that he met Patterson at the Shelter Room (Tr. 180, 190). The court ruled that it would permit the prosecutor to use the 1963 housebreaking and the 1966 petit larceny convictions to impeach appellant's credibility (Tr. 207-208).

C. *The Defense*

Appellant told the jury essentially the same story that he had told the judge in the two previous hearings. He said that Gloria Ervin placed the People's Drug Store bag filled with narcotics into the car and also placed something into his coat pocket (Tr. 235-236, 257). Appellant said the gun in the car was the property of Miss Calloway (Tr. 239). He testified that the police made him remove all his clothes in thirteen-degree weather while they searched him on the side of the road (Tr. 242). Appellant had driven Miss Calloway's car on numerous occasions (Tr. 246). Appellant said that once he and the group of people he was with were inside the Shelter Room he took the coats of everyone in the group, went outside, and placed them in the trunk of the car for safekeeping.[11] The prosecutor impeached appellant with the two prior convictions (Tr. 267).

Miss Calloway testified that the pistol and Mustang were hers, but not the narcotics (Tr. 270). She also stated that she left her coat in the "dressing room" at the Shelter Room and not with appellant to place in the trunk of her car (Tr. 286, 302). Miss Calloway testi-

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[11] This is the same trunk which appellant had earlier (Tr. 188; see Tr. 242) said could not be opened with the bent key when the police stopped him (Tr. 259).

fied that appellant had driven her car once previously (Tr. 273) and not on numerous occasions, as appellant had testified.[12]

ARGUMENT

I. The nine-month period between arrest and trial was not an abridgment of appellant's Sixth Amendment right to a speedy trial where a defense witness and her alleged testimony died in the interim.

(Tr. 3, 5-7, 95-103, 132-138)

Appellant's argument is without merit when he challenges that he was denied a speedy trial. This Court has held that in some cases the length of delay can be so great as to create a presumption of prejudice. *Hanrahan* v. *United States*, 121 U.S. App. D.C. 134, 348 F.2d 363 (1965); *cf. Jackson* v. *United States*, 122 U.S. App. D.C. 124, 125, 351 F.2d 821, 822 (1965). However, we respectfully submit that a delay of nine months between arrest and trial can in no way be the kind of presumption-generating delay discussed in *Hanrahan* or *Jackson*. In *Smith* v. *United States*, 118 U.S. App. D.C. 38, 331 F.2d 784 (1964) (*en banc*), this Court specifically held that in questions involving speedy trial, the rights of the accused must be balanced with the demands of public justice, and that a defendant will prevail only where the delay has been "arbitrary, purposeful, oppressive or vexatious." 118 U.S. App. D.C. at 41, 331 F.2d at 787. The Court in a later opinion went on to list several basic considerations which are to be considered in speedy trial cases: the circumstances of the case; the length of the delay; the reasons for the delay; the diligence of the prosecutor, court and defense counsel; and the reasonable possibility of prejudice resulting from the delay. *Hedgepeth* v. *United States*, 125 U.S. App. D.C. 19, 21, 365 F.2d 952, 954 (1966).

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[12] Appellant's statement was "I can't count the times I have driven that car" (Tr. 246).

In the instant case there had been a lapse of just six months from appellant's arrest to the death of Gloria Ervin. It is difficult to see how appellant could be tried for a narcotics offense of this magnitude in anything less than six months. The grand jury could not hear the case until a chemical analysis was made on some 232 capsules of heroin and 221 capsules of Desoxyn (Tr. 5). The indictment was returned on May 5, 1969, just one month after the case was presented to the grand jury. The United States Attorney's Office certified the case to the ready calendar in June, the same month in which Miss Ervin met her untimely death.[13] Neither the United States nor anyone else involved in this case was "arbitrary, purposeful, oppressive or vexatious" in preventing appellant from standing trial at the earliest practicable date.

Even if this case had gone to trial within six months and therefore before Miss Ervin's death, appellant is not on solid ground when he argues that Miss Ervin could have corroborated his story. Certainly Miss Ervin had the right not to be a witness against herself and in all likelihood would have exercised such right in the face of the severe sentence which can be received for these offenses. See *Hinton* v. *United States*, —— U.S. App. D.C. ——, 424 F.2d 876 (1969). Additionally, whether Miss Ervin had a People's Drug Store bag is really irrelevant since it appears from the record that appellant and the acquitted Mr. Patterson may well have been involved in the illicit sale of narcotics. The evidence in this regard shows appellant and Mr. Patterson as the only passengers in a car filled with narcotics. They had sums of money suitable for making change to potential customers on the street. Drugs were not only in the paper bag but elsewhere in the car and in appellant's pocket as well (Tr. 95-103, 132-138). We therefore submit that it would not have been relevant for appellant to prove a third person's

[13] Miss Ervin was murdered on June 19, 1969 (Tr. 3).

guilt when such proof did not establish appellant's innocence. 1 WHARTON, CRIMINAL EVIDENCE § 189, at 380 (12th ed. 1955).

The record reflects, moreover, that defense counsel never attempted to subpoena Miss Ervin before discovering her death one week before trial. Surely the inference can be drawn that counsel did not intend to call Miss Ervin as a witness, and therefore her death deprived appellant of nothing which could be expected in the way of testimony (Tr. 6-7). Having failed to take even the initial steps in the trial court to secure her as a witness, appellant should not now be permitted to take advantage of her unfortunate but entirely fortuitous death.

II. After taking testimony in a *Luck* hearing, the court properly exercised its discretion in permitting the use of two past convictions against appellant.

(Tr. 206-209)

Appellant asserts that the trial court abused its discretion in permitting the prosecutor to impeach his credibility with a 1963 housebreaking and 1966 petit larceny conviction. *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

In *Gordon* v. *United States*, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967), *cert. denied*, 390 U.S. 1029 (1968), this Court recommended that the trial judge should conduct "on-the-record" consideration in which the defendant has the burden of showing that the probative value of prior convictions, offered for impeachment, is "far outweighed" by the potential for prejudice to the defendant from the jury's being advised of his criminal past. The trial court in the case at bar followed this Court's advice and even went so far as to hear testimony outside the presence of the jury before determining which convictions, if any, could be used to impeach appellant. After having heard the testimony at the *Luck* hearing, the court forbade the Government from using a 1963 larceny and permitted the use of a 1963 housebreaking and a 1966

larceny.[14] The court filled the record with its reliance on *Gordon, supra,* and in so doing certainly moved within the great latitude accorded it to deny, limit or permit impeachment in a particular case. *Weaver* v. *United States,* 133 U.S. App. D.C. 66, 67, 408 F.2d 1269, 1270 (1969).

Appellant goes further astray when he argues that he was compelled to testify because of the absence of Miss Ervin. Had appellant felt compelled *not* to testify because of a fear of impeachment, then he might have a better argument. But in this case, where his testimony was sandwiched between an extensive and scrupulous *Luck* hearing and a prompt instruction to the jury that the evidence adduced by the prosecutor's questions was solely for the purpose of impeaching his credibility, he cannot be heard to disclaim discretionary findings on the part of the court. *United States* v. *White,* D.C. Cir. No. 23,041, decided May 22, 1970.

III. The evidence was sufficient to prove appellant knowingly possessed smuggled heroin which had no tax stamps affixed thereto.

(Tr. 80-85, 88, 92, 95-103, 132-138, 210-219, 309-345)

The Supreme Court in *Turner* v. *United States,* 396 U.S. 398 (1970), expressly recognized that heroin is not produced in the United States but is smuggled into the country and cannot be legally bought or sold here. *Id.* at 408-417. The Court went on to say that the possession of heroin means the possession of smuggled heroin, which in effect means that the real act proscribed by 21 U.S.C. § 174 is the knowing possession of heroin. For an accused to escape conviction, he must either rebut or challenge successfully the possession inference "by demon-

[14] An additional indication of the court's proper discretionary finding is seen in the court's refusal to let the prosecutor use any of the co-defendant Patterson's past convictions for impeachment (Tr. 209).

strating the fact or likelihood of a domestic source for heroin, not necessarily by his own testimony but through the testimony of others who are familiar with the traffic in drugs whether government agents or private experts." *Id.* at 409. In the instant case the cross-examination by counsel for appellant of the chemist, Mr. Steele, falls far short of the standard which appellant must meet in order to win reversal (Tr. 80-85).

Appellant attempts to liken the chemist's testimony to that degree of substantial rebuttal evidence which *Turner* said could possibly show a domestic source of heroin.[15] There simply is no legal source of heroin in the United States. The court in *Turner* upheld the statutory inference that the possession of heroin not in its original stamped package is the possession of smuggled heroin. The Court paid particular attention to the fact that Turner sold or distributed heroin and for that reason he had a special awareness that the drug was smuggled, since his livelihood depended on its entry into his hands. The instant case is much akin to *Turner* in that the evidence strongly suggests that appellant was selling the heroin and not innocently driving a drug-filled borrowed car. Appellant was stopped by the police after an 80-mile-an-hour chase. He had forty-six capsules of heroin in his coat pocket. There were 186 capsules of heroin in the glove compartment of the car along with twenty-one capsules of Desoxyn. Next to the seat was

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[15] Mr. Steele testified that he did not know where the heroin used for testing at his laboratory came from, since it was there when he first arrived. Mr. Steele did say that the heroin was manufactured by a chemical company and that there was a tax stamp on the bottle (Tr. 81). We suggest, however, that the statement concerning the tax-stamped bottle, elicited by defense counsel's somewhat confusing cross-examination in which the words "opium," "morphine" and "heroin" were used interchangeably, was an apparent error in his testimony, particularly in light of the extensive discussion of that very topic in *Turner*, *supra*. 396 U.S. at 411-412 nn.12-15. Mr. Steele went on to testify that no opium is grown in the United States and that for one to import opium legally he must do so through an opium permit from countries that have international treaties for such traffic (Tr. 84-85).

a paper bag with 200 Desoxyn capsules in it. Appellant had a pistol next to his seat, and beside the pistol sat John W. Patterson, who had in his possession sixty-nine $1 bills as well as three rolls of quarters and a pocket filled with change. One capsule of heroin costs $1.50 on the street, and one capsule of Desoxyn (known as "Bam" to the addicts) costs $1.00. None of the quantity of drugs had tax stamps or a prescription label affixed (Tr. 88, 92, 95-103, 132-138, 210-219). "Common sense," *Leary* v. *United States*, *supra*, 395 U.S. at 6, dictates that a trafficker in heroin will inevitably "become aware that the product [he] deals in is smuggled, unless [he] practice[s] a studied ignorance to which [he is] not entitled." *Turner*, *supra*, 396 U.S. at 417.

This case is further controlled by the recent opinion of this Court in *Morrison* v. *United States*, D.C. Cir. No. 21,998, decided July 15, 1970, slip op. at 4, where the Court said that such a case as this one was properly for the jury's determination. The jury can either believe or disbelieve any testimony of any witness, and here the jury credited the Government's evidence over that of appellant. Apparently the jury further believed that regardless of any single sentence in the testimony of Mr. Steele[16] (upon which appellant hinges his entire argument) appellant was nonetheless a possessor of the tangible drugs and the intangible knowledge that those drugs were smuggled into America and had never been touched by tax stamps.

The evidence properly went to the jury upon the court's extensive and proper instructions (Tr. 309-345). *Turner* clearly teaches us that no heroin is legally in the United States, and the jury correctly inferred from appellant's

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[16] See footnote 15, *supra*. It would appear from the extensive discussion of this topic in *Turner* that perhaps Mr. Steele meant a bottle of morphine, rather than heroin, with tax stamps on it, since morphine can be and is imported into the United States for medical reasons. Also, *Turner* recognized that morphine is readily convertible to heroin in a "childs play" chemical manufacturing process. 396 U.S. at 413 n.15.

failure to explain the absence of tax stamps and the possession of the heroin that appellant was in violation of 26 U.S.C. § 4704 (a) and 21 U.S.C. § 174.

CONCLUSION

WHEREFORE, appellee respectfully submits that the judgment of the District Court should be affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA

Appellee

vs. No. 24,089

CHARLES D. CANNON, JR. Criminal No. 653 - 69

Appellant

APPELLANT'S REPLY BRIEF

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ARGUMENT

I

THE APPELLANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL AND WAS PREJUDICED BY THE DEATH OF A MATERIAL DEFENSE WITNESS DURING THE DELAY

The Government confuses its duty to prosecute when it asserts that its prosecution was delayed by awaiting return of an indictment in this case. (Appellee's Brief p. 8) The prosecutors responsibilities begin not when the indictment is returned, but when the prosecution is begun. Hanrahan vs. United States, 121 U.S. App. D.C. 134, 137, 348 F2d 363, 366. Understandably, the Grand Jury would want to consider the chmical analysis of the substance obtained from the accused before returning an indictment but the Appellee fails to explain in its brief why four months was required to perform a chemical analysis of the narcotic drugs.

In short, the delay in reaching a trial in the instant case resulted from the Government's acts and was not unavoidable as Appellee would have this Court believe.

Of course, Gloria Ervin had the right not to be a witness against herself as is suggested by the Appellee (Brief p. 8) but to assume that she would not have testified has no place in determining the prejudice to the defense caused by her death. Indeed, trial of this case produced another witness (Dolores Venice Calloway TR 268-303) who did testify against

herself and the past experience shows many examples of witnesses taking such risks.

To argue as the Government does, that proof of a third person's guilt would not be relevant to appellant's defense is contrary to established trial techniques in defending criminal cases. Furthermore, it is an argument that is founded on facts not present in this case. For example, Appellee continues to assert that Appellant and Mr. Patterson were involved in the illicit sale of narcotics despite the fact that Mr. Patterson has been acquitted. In Appellee's Brief (p. 8) it is stated "They had sums of money suitable for making change to potential customers on the street." Although the money found in the acquitted Mr. Patterson's possession at the time of his arrest was mentioned at the trial, there is no evidence that it was to be used for change in the sale of narcotics.

At this point, Counsel for the Appellant must express his resentment to the continuing disbelief of the Government with regard to the intention of defense counsel to use Miss Ervin as a witness. This was explained at the time of trial (TR 7-8) by counsel in open court and despite the representations of counsel, the Government continues to accuse counsel of not telling the truth. (Appellee's Brief p. 9).

In summation, a delay was experienced in reaching trial in this case and the Appellant was prejudiced by the death of a material witness during the period of delay. No amount of speculation, attempted inferences or assumptions by the Government can avoid these facts and consequently the Appellant was deprived of his Constitutional rights.

II

THE COURT ABUSED ITS DISCRETION IN PERMITTING THE USE OF TWO PAST CONVICTIONS AGAINST THE APPELLANT AFTER TESTIMONY IN A LUCK HEARING

The Government suggests that the Appellant should not have testified in his own defense in order to advance a better appellate argument concerning the lower Court's ruling on admissibility of prior convictions (Appellee's Brief p 10). If such a rule of law is established, the inhibiting pressures on defendants in future cases involving Luck[1] problems will effectively deprive them of their right to take the stand.

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1 Luck vs. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)

To further suggest that the prompt instruction to the jury that the evidence adduced by the prosecutor's questions was solely for the purpose of impeaching the credibility of the witness, somehow adequately protects a defendant who is forced to take the stand, avoids the realities of trial practice.

The Court in Gordon vs. United States, 127 U.S. App. D.C. 343; 383 F.2d 936 forsaw circumstances found in the instant case when they stated at 127 U.S. App. D.C. 343, 347-348:

> "Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment." (Emphasis added).

Appellant Cannon was forced to take the stand at the trial to present his defense. As explained before, because of the death of Miss Ervin, he was the only person to present the facts supporting his defense. Where such a demand is placed on the defendant it is difficult to imagine the need for the jury to receive evidence of prior convictions involving must less serious offenses and occurring long before the trial in question. On the other hand, it is not difficult to imagine the effect of such evidence on a juror's determination of guilt.

III

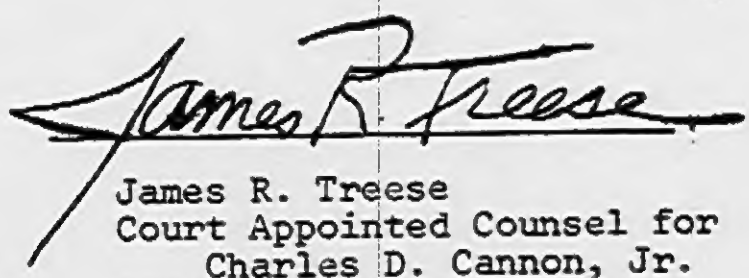
THE STATUTORY PRESUMPTION OF GUILT AS TO ILLEGAL IMPORTATION OF NARCOTIC DRUGS AND KNOWLEDGE OF SAME CANNOT BE UPHELD WHERE EVIDENCE OF LEGAL IMPORTATION OF NARCOTIC DRUGS AND LEGAL DOMESTIC MANUFACTURE OF NARCOTIC DRUGS WAS INTRODUCED

It seems that the Government is now discrediting the testimony of its expert witness, Mr. Steele. In stating as they do in the Brief (p. 11), "There simply is no legal source of heroin in the United States." Mr. Steele testified that heroin is manufactured in this country (TR 81) and that an opium permit is available to domestic drug houses through international treaties (TR 84). The Supreme Court in Turner vs. United States, 396 U.S. 398 speaks of heroin used in scientific experimentations supplied from quantities seized by law enforcement officials (at footnote 13). This appears to be contrary to Mr. Steele's statement that "Actually it [heroin] was manufactured from a chemical company with a tax stamp on the bottle." (TR 81). The Government now claims that Mr. Steel meant a bottle of morphine rather than heroin (Appellee's Brief p. 12, footnote 16). This amounts to nothing more than hopeful speculation on their part and this Court should concern itself with what the witness actually said and not with what the Government thinks he meant. In conclusion, the Government's witness, Mr. Steele, has testified as

to the existence of "legal heroin" in the United States and as such the statutory presumption of illegal importation should not be allowed to exist.

CONCLUSION

Based on the arguments presented in Appellant's Briefs, it is urged that the conviction of Charles D. Cannon, Jr. be reversed and that he be acquitted.



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